UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/AC.4/2000/5
6 July 2000

ENGLISH
Original: ENGLISH/SPANISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on the Promotion and Protection
of Human Rights
Working Group on Indigenous Populations
Eighteenth session
24-28 July 2000
Item 6 of the provisional agenda

STANDARD-SETTING ACTIVITIES, INCLUDING A REVIEW OF INDIGENOUS PEOPLES' RELATIONSHIP WITH NATURAL RESOURCES, ENERGY AND MINING COMPANIES

Information received from indigenous organizations

The present document contains information received from an indigenous organization relating to item 6 of the provisional agenda.

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[6 June 2000]
[Original: English and Spanish]

GE.00-14230 (E)

I. BACKGROUND

1. The concept of a code of conduct dates back to the beginnings of mercantile society, when government power and businessmen already felt the need to regulate trade and shipping disputes. The development of the concept is closely linked to developments in the old and new international economic orders.

2. The fact that the international community has shown an interest in the establishment, activities and evolution of trading and financial companies from their earliest form (Company of the Staple in England) to their highest form (General Electric in the United States) is nothing new. What is new is the transnationalization of their activities and the submission to their control and service of all human activity: production and consumption, politics, democracy and human rights.

3. In the late nineteenth and early twentieth centuries, economic actors were faced with the need to adopt laws against unfair competition, as in the case of United States antitrust legislation, in order to regulate the free competition which had led to trade abuses, fraud and disputes between colonial powers about the division of markets and the domination of colonies and dependent countries.

4. Following the Second World War, the 1948 Havana Charter, which the United States Congress refused to ratify, was an attempt to regulate the handling of international financial capital throughout the world. For the first time, the Charter, which provided for the establishment of an international organization that would later become GATT, recognized the right of capital-importing countries to control foreign direct investment (FDI).

5. The assertion by colonized peoples and peoples in the process of decolonization of their right to self-determination and economic independence was no more than an expression of their national sovereignty. Formerly, sovereignty was used to affirm the nation-State against medieval absolutism; at present, it is a weapon in the struggle by the peoples of the third world to reaffirm their political and economic position and challenge the harmful activities of TNCs.

6. The opponents of codes of conduct never tire of accusing the developing countries of wanting to distort the principle of sovereign equality, reduce duties and obligations according to their own interests and try to restrict the sovereignty of other States.

7. Political sovereignty was not and would not be enough to affirm national identity if peoples who acceded to independence did not enjoy adequate economic sovereignty. According to this key approach, the nationalization of the property and assets of foreign companies in the public interest is fully justified.

8. The scope and nature of sovereignty will otherwise be fictions in North-South relations if the industrialized countries do not demonstrate the political will to negotiate rules of conduct in the interest of multinationals and States. The 1971 nationalization of the North American trust, Gulf Oil Company, by the J.J. Torres Government in Bolivia and the expropriation of copper mines in Chile by Salvador Allende in 1972 show that TNCs are capable of using threats and blackmail to overthrow Governments which are defending their national sovereignty.

II. NEGOTIATION OF THE CODE IN THE UNITED NATIONS

9. Since the 1970s, the international community has been trying, without tangible results, to draft codes of conduct to regulate the irrational behaviour of powerful economic entities and consortiums in particular areas of the economy and trade, as well as foreign direct investment and the reasonable use of natural resources.

10. As a result of conflicts created by FDI and nationalizations by host States, the thorny question of transnational corporations was discussed specifically in a United Nations text for the first time in 1972 (resolution 1821 (LIII), of 28 July 1972, adopted by the Economic and Social Council).

11. Two years later, in its resolution 1913 (LVII), of 5 December 1974, the Economic and Social Council decided to establish the Commission on Transnational Corporations to assist it in formulating a set of recommendations. The burning desire to draft rules of conduct thus started to become a reality. The concept was broadened, explained and defined in later United Nations resolutions, even though the Commission's attributions were still up in the air.

12. The Commission on Transnational Corporations held its first session in March 1974, having on its provisional agenda the consideration and formulation of a set of standards and rules which would, as a whole, serve as an outline for a future code of conduct that would be binding on TNCs and States as subjects of international law.

13. In the meantime, the Intergovernmental Working Group established by the Commission in Lima in March 1976 would begin its work on the negotiation and drafting of standard-setting provisions of the code of conduct in January 1977. Following its seventeenth session, the group, which was composed of persons of recognized competence, submitted the draft code in 5 chapters and 71 articles to the Commission for its consideration in May 1982 (see Négociation d'un Code, by Eugène Berg, Rev. Société française pour le droit international, p. 227).

14. However, the desire to set standards for the blind conduct of TNCs in what had so far been de facto regulations led to a violent reaction in decision-making centres and parent companies. The market economy countries were thus unwilling to negotiate a compulsory code which would be too binding on their corporations in terms of the policy of liberalization and give too much power to host countries.

15. As was to be expected, substantive differences of opinion on the scope of the code and its legal nature arose between the highly developed countries and the developing countries at the third session of the Commission. The former wanted simply a solemn declaration of principles in the form of recommendations, while the Group of 77, supported by the socialist countries, wanted it to set standards and thus to be an international instrument that was legally binding on TNCs and States, including United Nations specialized agencies.

16. After lengthy and controversial negotiations which lasted nearly 20 years, government delegations were unable to reach a consensus on the draft code and, in 1992, at the request of the

United States of America, they decided to abandon the discussion of one of "industrial civilization's" most pressing problems. Once again, strategic neo-colonial interests took precedence over the political and sovereign will of peoples.

17. Under resolution 47/212 B on the restructuring of the United Nations, adopted by the General Assembly on 6 May 1993, the Centre on Transnational Corporations, which submitted its fourth and last report to the Working Group on Indigenous Populations in 1994, was scrapped and replaced by the Division on Foreign Direct Investment.

18. The collapse of the negotiations was without any doubt the result of the pressure exerted by powerful Western economic and financial circles and, especially, of the impact of the guidelines given to Governments by the World Bank and IMF on the handling of FDI in host countries.

III. WHY IS THERE AN URGENT NEED FOR A CODE?

19. Because, in the logic of the absolute law of free trade in search of capital gains, which is the driving force behind globalization, the transnational movement of financial capital is the living expression of blind and anarchical market economy forces, which are absolutely free to indulge their unbridled passion to colonize the world, speed up the dismantling of mechanisms and rules of conduct, liberalize trade and privatize State-owned enterprises at any cost.

20. These days, no economic, social and cultural problem, however big or important, escapes the voracity of TNCs, which are real spider's webs all mixed up in the production and distribution of goods and services, the accumulation of capital, the mobility and closing of enterprises, large-scale layoffs and stock market speculation, thereby creating a financial crisis with serious consequences for peace and security.

21. With their universe that is so vast and complex and their hegemonic power that is so infinitely great, TNCs are solidly embedded in all basic spheres of the economy from North to South, including the United Nations system itself, and behave anarchically. They are now present everywhere on indigenous peoples' land and territory, whose natural wealth and resources they covet unashamedly as being strategic for the development of the Western world.

22. In their desire to earn as much as possible and to accumulate capital gains, TNC decision-making centres use a number of mechanisms, including financial institutions such as the World Bank and IMF, unlawful means such as bribery of senior government officials, members of parliament and members of the military, the corruption of businessmen and political pressure and financial blackmail of progressive Governments.

23. We may, for example, refer to the case of the direct intervention of the North American multinational corporation, International Telephone and Telegraph (ITT), in the overthrow of Salvador Allende's constitutional Government in Chile in 1973. The multinational Gulf Oil Company was also involved in the military coup which overthrew the Government of J.J. Torres in Bolivia in 1971 and the United Fruit Company interfered with Jacobo Arbenz's Government in Guatemala in 1954.

24. According to a United Nations study, the universe of TNCs in the early 1990s was composed of 37,530 parent firms which controlled 206,961 affiliates and employed 73 million persons, i.e. no fewer than 3 per cent of the world's labour force (World Investment Report 1994).

25. Five years later, a report published in 1999 by the UNCTAD Division on Transnational Corporations and Investment stated that the 100 largest TNCs, ranked according to the value of their assets throughout the world, together held $1.8 billion in foreign assets, accounted for $2.1 billion in foreign sales and employed some 6 million persons in their affiliates (report on FDI in the world, New York, 1999, p. 2).

26. Ranked according to origin, nearly 90 per cent of the 100 largest TNCs come from Western Europe, Japan, Canada and the United States, while only two corporations from developing countries are on the list: Petroleos de Venezuela and Daewoo Corporation from Korea (ibid.). Based on its foreign holdings ($304 billion), the gigantic General Electric is the largest TNC and holds top place for the second consecutive year.

27. As a result of the liberalization of the regime for the handling of capital, foreign direct investment increased from 1998 to 1999. According to the above-mentioned report, 60 countries introduced changes in their legislation and adopted amendments to regulations on the handling of foreign capital in order to create more favourable conditions for investors' appetites.

28. With the disintegration of the Soviet Union, a world conglomerate of monopolies and trusts set out to conquer and colonize the Great Siberian North, which is potentially rich in natural resources such as oil, natural gas, gold, diamonds and uranium that have traditionally belonged to the indigenous peoples of this enormous territory.

29. As mankind slowly succumbs in a world without laws or ethics, the lack of an international legal framework which is capable of regulating the activities of TNCs and their direct investments in the third world is being felt more than ever. The urgent need to adopt rules of conduct depends on a number of factors.

30. First, by their very nature and essence, powerful monopolies and holdings that are constantly seeking the greatest profits and returns behave irrationally and instinctively. They have no laws and are not subject to host countries' jurisdiction. Their basic objective is to loot natural resources and exploit the labour force. Social problems are of no concern to them.

31. Secondly, receiving States have lost their ability to negotiate and cannot legally claim jurisdiction over the foreign affiliates established in their territories because their legislation has been dismantled and, in many cases, contains no reference to the term "transnational property" or the concepts of the corporate nationality and legal status of TNCs.

32. Thirdly, as a result of the liberalization of FDI, supranational economic entities are neither national nor stateless, but operate vertically and are subordinated to parent companies, i.e. to the jurisdiction of decision-making centres based in Western countries.

33. In the light of the foregoing, it is first of all essential to define the nature of transnational property, the concept of the nationality of TNCs and the scope of their rights and obligations. The Sub-Commission expert and other thematic mechanisms should formulate clear-cut and detailed standards and rules in order to:

(a) Determine the globally negative impact of the activities of TNCs on the enjoyment of economic, social and cultural rights, particularly the right to development;

(b) Define the right of TNCs to own property and identify their economic structure, legal status and global strategies for concentrating capital and markets at the world level;

(c) Investigate illegal transfers of capital from poor countries to rich countries in the form of interest and debt servicing, as well as unlawful operations and speculation characterized as economic crimes;

(d) Determine the legality of mergers of enterprises and banks, insurance companies and information media for the establishment of monopolies;

(e) Regulate the use and misuse of financial mechanisms (World Bank, IMF, UNDP, WTO and other international development assistance agencies) in the service of Western interests;

(f) Evaluate the interference of TNCs in the political life of States by means of the corruption and bribery of senior government officials, members of parliament and members of the military;

(g) Determine their historic responsibility in the pollution of the environment, the destruction of Mother Earth and the laundering of narcodollars;

(h) Evaluate the activities of TNCs operating in indigenous peoples' territories and the impact on indigenous peoples' rights to land, natural resources and sustainable development.